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Supreme Court of the United States

OCTOBER TERM, 1903.

No. 230.

ROBERT L. WEST AND GEORGE I. KLINE,
PLAINTIFFS IN ERROR.

versus

STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF LOUISIANA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF PLEADINGS AND EVIDENCE.

Without burdening this brief unnecessarily, at this time, with quotations from the Record, we submit the following brief statement of the facts as evidenced by the record, and the pleadings.

Later on herein we will cite fully those portions of the record touching the issue now before this Honorable Court.

A man named Manners, a butler to a gentleman named P. G. Thebaud, residing in New York City, absconded

with a considerable amount of personal property belonging to Thebaud, and brought it to New Orleans. West and Kline, plaintiffs in error, were arrested and charged with having stolen this property of Thebaud's from Manners, the original thief, within the parish of Orleans, in the State of Louisiana. At a preliminary trial before the committing magistrate, Thebaud and Manners were examined and their depositions were taken in writing, and duly certified. The accused, plaintiffs in error here, were present with their counsel and cross-examined these two witnesses. On the trial of the cause in the Criminal District Court, the District Attorney prosecuting, and the proper foundation having first been laid, for the introduction of the depositions of the two witnesses, by showing that the witnesses were absent from the State beyond the jurisdiction and process of the Court, the depositions were admitted in evidence, by the trial Judge, over and in spite of the objection of counsel of the accused, who reserved bills of exception to the admission of the evidence, basing them on the grounds:

1st. That the admission was contrary to that provision of the Louisiana Constitution which guaranteed to the accused a confrontation with the witnesses; and

2nd. That the admission was in violation of the Fourteenth Amendment to the Constitution of the United States. The accused were convicted and from that verdict a suspensive appeal was taken to the Supreme Court of the State of Louisiana, which affirmed the verdict, and decided that the admission of the depositions in the trial court was not violative of the State Constitution.

The question raised in the lower Court as to the violation of the Fourteenth Amendment to the Constitution of the United States, seems not to have been argued in the Supreme Court of the State, and was not passed upon by that

court in its opinion. From this decision of the State Supreme Court the present writ of error was taken to this Honorable Court, on the Federal question involved, the decision of the Supreme Court of Louisiana as to the constitutionality under the State Constitution not being reviewable by this Honorable Court.

ARGUMENT.

From the foregoing statement of the pleadings and evidence and the assignment of errors here contained in the record in this cause, it appears that the writ of error herein is sought to be based on two alleged Federal questions:

1st. That the trial Court and the Supreme Court of Louisiana erred in admitting certain evidence on the trial of the cause, because under the common law as administered in the State of Louisiana, and under the protection of due process of law accorded by the Fourteenth Amendment to the Constitution of the United States, the question as to whether a proper predicate had been laid for the administration of subordinate and secondary proof, was a question determinable not by the Court, but by the jury, and before the administration of secondary proof, and particularly the *ex parte* depositions of the said Thebaud and the said Manners, alias Kern; and that the action of the Court, as appears by the record, in determining a question of fact, which should have been, under the laws and Constitution of the United States, submitted to the jury, violates petitioners' rghts under the common law and as protected by the said Fourteenth Amendment to the Constitution of the United States, inasmuch as it operates a denial of the benefits and protection accorded to the plaintffs in error by the said Fourteenth Amendment to the Constitution of the United States."

(*VIII* error assigned, page 175 Record.)

2nd. That there was error in admitting the transcript of the evidence of Thebaud and Manners, alias Kern, on the trial of the cause, which evidence was taken before the committing magistrate, and was admitted by the ruling of the trial Court, and that by said ruling the plaintiffs in error were deprived of "the benefits, advantages and protection guaranteed to them by said Fourteenth Amendment to the Constitution of the United States, inasmuch as they had not an opportunity of confrontation with the witnesses against them, and the pretended statements made by said Thebaud and said Manners, alias Kern, were not admissible as evidence against plaintiffs in error, or either of them, and should not have been submitted by the trial court to the traverse jury, nor considered by the Honorable the Supreme Court of Louisiana * * * and the affirmance by the Honorable the Supreme Court of Louisiana of the action of the trial court in this regard, was in disregard of the protection guaranteed to plaintiffs in error by the Fourteenth Amendment to the Constitution of the United States, prohibiting a State and each and all of its agencies from depriving a person of his life, liberty or property without due process of law."

(IX assigned error, pages 175 and 176 Record).

I.

Ruling of Trial Court on Admission of the Depositions of Thebaud and Manners, Alias Kern, as to the Proper Foundation for Admission.

It is difficult for us to comprehend upon what principle of law or practice the proposition is made by the plaintiffs in error in the VIII paragraph of their assignment of error, viz., that it rested with the jury and not with the trial court to decide upon the proper foundation being laid for the admission of the evidence. Not having before us at

this writing a copy of their brief, we cannot imagine on what grounds they base their contention.

Should their brief, when seen by us, contain any argument, or citation of authorities, we will hereafter, if we deem it necessary, file a supplemental brief in reply thereto.

Paragraph VIII of the assignment of errors, page 175 Record, claims in the first clause, "That the said Court erred in maintaining the right of the trial Court to withdraw an issue of fact from the jury," and it is thereby claimed that by deciding in favor of the admissibility of the depositions, that the trial Court was usurping the functions of the jury in the determination of a question of fact. It is impossible for us to realize how any ruling of a Court on the admissibility of evidence involves any question of fact.

The decision as to whether testimony so admitted is true or not is a question to be finally determined by the jury by its verdict. The question as to the admissibility of evidence, that is as to whether the proper foundation or basis for its admission has been first laid, is a question of law, to be determined by the trial Court.

If the contention of plaintiffs in error be correct then in all cases in which objection may be made to the admission of testimony in any case because the proper foundation has not been laid, juries would be constantly called upon to decide these pure questions of law which in many cases would involve intricate questions and a profound knowledge of law far beyond, in many instances, the comprehension or knowledge of the ordinary laymen, from whom our juries are commonly drawn.

Not only is it true that the trial Court acted within its authority in ruling upon these depositions, but it is also true that whether we are right or wrong in our contention on this point, this question cannot be considered here by

this Honorable Court, because no such question was raised or argued either in the trial Court or in the Supreme Court of the State of Louisiana. Bearing in mind that the error now raised here in this Honorable Court for the first time, as to the want of authority on the part of the Court to rule upon the admissibility of the depositions, a reference to the various objections and bills of exceptions contained in the record will show that no such issue was raised or decided in the trial, or the appellate Court. A brief reference to the bills of exception filed in the trial Court will show that no such issue was raised or passed upon by the Court, and that the only issue tendered on this point was, that sufficient evidence had not been offered to lay the foundation or basis for the introduction of the depositions. The only ground assumed by the plaintiffs in error in the trial Court was based on the insufficiency of the evidence as a predicate for the introduction of the depositions. *They nowhere put at issue or question the right of the Court to decide on the admissibility of the evidence and on the question that the proper foundation had not been laid for its introduction.*

On the contrary, on pages 93 and 94 of the record plaintiffs in error seem to admit the right of the Court to pass upon the admissibility of the evidence, for when the State, after having laid the foundation, had offered in evidence the depositions, the record shows that to such offer counsel for defendants objected on the following grounds, "because nowhere in this evidence which was offered to lay a foundation for the introduction of testimony taken or alleged to be taken before the committing magistrate of the witness Thebaud, is it shown that he is at this time out of the City of New Orleans, this day, nor is there any evidence offered on behalf of the State to prove affirmatively that the witness named Thebaud is permanently absent from the State of Louisiana. Counsel for these defendants furthermore

stated to the Court that they had other objections to urge to the introduction of this testimony, which could not be urged at this time, unless the Court considered that proper foundation had been laid, to which the Court stated: 'By the Court, upon the evidence offered, I will allow the testimony offered.' Counsel then and there stated to the Court and asked whether the Court considered that sufficient foundation had been laid, to which the Court answered 'yes;' and to the ruling of the Court at this time made, permitting the testimony of this witness, Paul G. Thebaud, to be read, counsel then and there reserved a bill of exception, which they now offer for signature, and pray that the same be now filed and made a part of the record herein." It will thus be seen that at that stage of the proceedings no question was raised as to the right of the Court to decide the question as to the proper foundation having been laid for the admissibility of the depositions.

Nor is there in bill of exception No. 3, Record, p. 94; in bill of exception No. 5, page 102, Record; bill of exception No. 6, page 11, Record; bill of exception No. 7, page 112, Record; bill of exceptions No. 8, page 114, Record; bill of exceptions No. 9, page 115, Record; bill of exception No. , page 115, Record, any line or syllable, or even intimation of any such question being raised as to the power of the Court to pass upon the question of the sufficiency of the foundation and basis for the introduction of the depositions.

These are all the bills of exception filed, as the bills of exception Nos. 1 and 2 were as to another point, that is to the question of jurisdiction, and the bill of exception No. – must be the bill of exception No. 4, as no bill numbered 4 appears in the record under that number. Nor is there anything in the assignment of errors in the Supreme Court of the State of Louisiana, page 145 *et seq.*, raising the ques-

tion of the power of the Court to decide this question, but in the 3rd paragraph of the assignment of error in the Louisiana Supreme Court, pages 146 and 147, the error assigned is that the trial court erroneously ruled that sufficient evidence had been offered to lay the foundation for the admission of the depositions, and no error is assigned that the Court had no power to pass upon the sufficiency of the foundation and basis. Thus it will be seen that the raising of this question here in this Honorable Court for the first time is *res nova,* and cannot be considered by your Honors.

We are informed, however, that counsel for plaintiffs in error will abandon, and will not urge, this point in the present argument and hearing. We therefore pass on to the only remaining point in the case, which is:—

II.

The constitutionality *vel non* of the statute of Louisiana, which permits the use of depositions, taken before a committing magistrate in the presence of the accused, of absent witnesses beyond the process of the Court, on the trial of the case in the District Court, under the Fourteenth amendment to the Constitution of the United States which is the only Federal question involved in this Honorable Court, under the writ of error, and the assignment thereunder.

What are called in this assigned error, *ex parte* depositions are really in no sense such, as the depositions were taken contradictorily with the accused, the plaintiffs in error, in their presence and that of their counsel, by the latter of whom the deponent witnesses were fully cross-examined in open court. By what process of reasoning this testimony can be called *ex parte* we are at a loss to imagine.

The IX error assigned (page 175, record), claims that

the trial court erred in admitting the depositions of the absent witnesses taken before the committing magistrate, and that the Supreme Court of Louisiana erred also in affirming the correctness of the ruling of the trial court in admitting the depositions. This error is assigned because of "it not being shown that the parties whose depositions were sought to be used were dead, or insane or absent by the connivance or procurement of the accused; and the Court, by its act in the admission of said depositions with directions to the jury to consider the same, denied to plaintiffs in error, and to each of them, the benefits, advantage and protection guaranteed to them by said Fourteenth amendment to the Constitution of the United States, in as much as they had not an opportunity of confrontation with the witnesses against them," etc. (IX error assigned pages 175 and 176, record).

The objection here raised is to the constitutionality of Act of the General Assembly of the State of Louisiana, No. 124, page 179, Acts of Louisiana 1896. This Act is entitled "An Act relative to the taking of testimony of witnesses in criminal cases," and provides for the taking of the evidence of witnesses before committing magistrates, and in section 3 provides, "That said testimony in case of the death or departure of said witness from the parish, or other inability to attend, shall be admissible in evidence before the grand jury as well as before the petit jury on the trial of the accused, subject to all legal objections; but the same shall not be admissible when the presence of said witness can be procured by subpoena."

The objection and error also attacks the constitutionality of Act No. 123 of the Acts of the General Assembly of the State of Louisiana of 1898, (page 179 *et seq.*) This act is entitled "An Act to provide for the organization of the First and Second City Criminal Courts of the Parish of

Orleans, providing for their officers and their duties, and for certain rules of procedure and the effects thereof in the cases within their jurisdiction."

Section 2 of said act provides for the taking of testimony by a stenographer, as was done in the case at bar, and the last clause in the section provides that "when the testimony so taken is certified to by the stenographer and signed by the judge, *it may be used as evidence in any subsequent judicial proceedings, in case of the death or absence of the witness from the State.*" (The italics are our own.)

The constitutionality of these two acts is attacked as being in violation of the clause of the Fourteenth amendment to the Constitution of the United States, which reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction of the equal protection of the laws."

Section 2 provides that, "The Congress shall have power to enforce by appropriate legislation the provisions of this article.'

It is contended by plaintiffs in error that the two Louisiana Statutes already quoted do "abridge the privileges and immunities of the citizens of the United States," and do "deprive" persons "of life, liberty or property without due process of law." The contention is that the taking away from the accused, the plaintiffs in error here, of the right of confrontation with the witnesses against them on the final trial of their case, deprives them of their liberty "without due process of law," and thereby violates the amendment.

Testimony of absent witnesses taken before committing magistrates, is admitted on final trial in criminal cases in

California, Michigan, Texas, Alabama, Arkansas, Tennessee, and New York. 108 Cal. 597; 105 Mich. 434; 46 Tenn. (6 Cold.) 352; 30 Tex. App. 160; 73 Ala. 495; 40 Ark. 454; 1 N. Y. Crim. App. 102, in nearly all of which, if not in all, under statutory provisions similar to those of Louisiana, here in contest, and such procedure has been uniformly sustained in those States as Constitutional.

The controversy here turns on the question as to what constitutes "due process of law." Congress has not yet availed itself of "the power to enforce by appropriate legislation the provisions of this article" under Sec. 2, of the amendment. Under it that body might probably define what is "due process of law," but has not yet done so. As the present cause here turns on what is "due process of law," we must therefore turn to the decided cases and commentators to determine what is meant by the phrase.

2 Kent's Comm., 13, says:

"'Due process of law' means law in its regular course of administration through courts of justice."

Cooley, in his work on Constitutional Limitations, page 224, says:

"When life and liberty are in question, those must, in every instance, be judicial proceedings; and that requires an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before punishment can be inflicted. *But the State will prescribe their own modes of proceeding and trial.*" (The italics are our own.)

In 56 California 237, *et seq.*, will be found a learned and able discussion as to what is "due process of law," and the "law of the land," in which the authorities are quoted to show these terms are applied to such procedure as the States may see fit to enact, under certain general principles. The bearing of the Fourteenth Amendment there-

on is learnedly discussed, but at such length as to preclude its insertion here. The conclusion is reached (page 240) that "The requirements of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. The process of the State is regulated by the law of the State."

In 64 Mo. 565, it was held "that the phrase 'due process of law,' or its equivalent 'law of the land,' does not mean a law enacted for the purpose of working the wrong; but the general law in its regular course of administration through the courts of justice; a law which hears before it condemns; proceeds upon inquiry and renders judgment only after trial." Syllabus 5th.

If we correctly understand the position of counsel of plaintiffs in error, it can be broadly stated in this form: The States of the American Union are bound by the principles and practice of the English Common Law, in so far as the rights of the accused citizen may be concerned, in criminal cases, that is the English Common Law as it prevailed in Great Britain when our ancestors settled this country, and any departure therefrom, affecting the substantial rights of citizens on trial is unconstitutional, as depriving the accused of "due process of law," and statutes of States of the American Union changing the Common Law in any respect are in violation of the Fourteenth Amendment to the Constituion of the United States. States.

In this case, it is claimed that the Louisiana statutes depriving the accused of the right of confrontation of witnesses are unconstitutional. If this be true, then all similar statutes of all the States providing that depositions taken before committing magistrates contradictorily with the accused can be used on the final trial are unconstitu-

tional. This doctrine would strike with nullity all such statutes in the various States, in which they have been adopted.

For instance, the Penal Code of California, § 686, provides that in criminal cases confrontation with the accused on final trial must be had "except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer, in the presence of the defendant, who has, either in person or by counsel, examined or had an opportunity to cross-examine the witness * * * the deposition of such witness may be read, upon its being satisfactorily shown to the Court that he is dead or insane, or *cannot, with due diligence, be found within the State,*" and this provision has been sustained in 85 Cal. 421; 24 Pac. 1006; 33 Pac. 778.

Again, under Section 8 of the New York Code of Criminal Procedure, it is provided that a deposition of an absent witness taken before a police magistrate can be used on the final trial of the case "upon it being satisfactorily shown to the Court that he (the witness) is dead or insane, *and cannot with due diligence be found in the State.*" (The italics are our own.)

This provision was maintained in 1 N. Y. Crim. Reps., 104, as constitutional.

See also 105 Mich. 434; 63 N. W. 405; 33 Ark. 539; 40 Ark. 461; 98 Ala. 45; 13 South. Rep. 499; 23 Atl. 110 (Penn).

There are besides these cases a number of similar decisions cited in the text books, and digests, which are not accessible to us, nor are the various statutes within our reach so as to give quotations from the special statutes of these various States on this subject.

Greenleaf on Evidence (12th Ed.), 3d Vol., Sec. 11, page

14, sustains the use of depositions and adds, "Statutes of similar import have been enacted in several of the United States, but it is conceived that under the constitutional provisions above mentioned, no deposition would be deemed admissible by the force of these statutes, unless it were taken wholly within the prisoner's presence, in order to afford him the opportunity to cross-examine the witnesses; nor then except as secondary evidence, the deponent being dead, *or out of the jurisdiction.*" (Italics are our own.)

So Cooley, Const. Limitations, 1st Ed., page 318, says:

> "If the witness was sworn before the examining magistrate, and the accused had an opportunity then to cross-examine him, or before a coroner, or if there was a former trial in which he was sworn, it seems allowable to make use of his depositions, or the minutes of his examination if the witness has since deceased, *or is out of the jurisdiction, or cannot be found after diligent search,* or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party." (Italics are our own.)

In the note Cooley refers to Greenleaf and also Bishop, Cr. Pro., § 520 to 527.

All these authorities sustain the proposition that a State statute allowing depositions taken contradictorily with the accused before the committing magistrate can be admitted on the trial of the case. However, they seem to turn on the provisions of State Constitutions. An exception, however, is found in 36 Tex. Crim. Appeals, 320 (Cline vs. State), in which a divided court decided that depositions of a witness taken at a preliminary hearing, in the presence of the accused, could not be used on the final trial, when the witness has died. But this decision rests on the violation of Sec. 10, of the Bill of Rights of the Const. of Texas, and

on the peculiar phraseology of the Texas Statute and Criminal Code, and overrules six prior decisions of the same court on the same subject.

In the case at bar, the Supreme Court of Louisiana has sustained the Louisiana Statute as not being in conflict with the Constitution of the State (Rec. p. 162 *et seq.*). Thus this question is eliminated from the discussion in this Court, and the only issue presented is, as we have said, *is the Federal question under the Fourteenth Amendment to the Constitution of the United States.*

In none of the cases cited, except in the California case, has this precise question been hitherto raised. The Supreme Court of Louisiana in its opinion does not seem to have touched upon it, although it is true that (on page 173 Record) the Chief Justice in granting the writ of error says: "The writ of error applied for is hereby granted as prayed for, although I have serious doubts whether any Federal question is involved." In the Supreme Court of the United States the direct question in regard to the confrontation of witnesses with the accused on the main trial has never arisen, nor even been incidentally passed upon. However, the right of the States to vary by statute the Common Law, although affecting the substantial rights of citizens, in several important particulars, has been sustained by this Honorable Court, as not being in violation of the Fourteenth Amendment.

In Walker vs. Sauvinet (a civil case), 92 U. S. 90, it was decided that "a trial by jury at Common Law pending in the State courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment of the Constitution of the United States." (Syllabus.)

In Hurtado vs. People of California, 110 U. S. 516, it was decided that "the words 'due process of law' in the

Fourteenth Amendment do not necessarily require an indictment by a grand jury in a prosecution by a State for murder." (Syllabus.)

In Iowa Cent. Railway Co. vs. Iowa (a civil case), this Court held that "the Fourteenth Amendment to the Constitution in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided." (Syllabus.)

166 U. S. 688, Long Island Water Supply Co. vs. Brooklyn (a civil case), similarly decides.

In 176 U. S. 581 (Maxwell vs. Dow), it was decided that "the trial of a person accused as a criminal by a jury of only eight persons, instead of twelve, and his subsequent imprisonment after conviction, do not abridge his privileges and immunities under the Constitution as a citizen of the United States, and do not deprive him of his liberty without due process of law." (Syllabus.) In this opinion reference is made to 137 U. S. 624; 139 U. S. 462, 467, and other cases, in all of which this Honorable Court held that the States could pass laws varying judicial procedure from those of the Common law, if such statutes applied equally to all citizens without discrimination, and such statutes would not be construed as being in violation of the Fourteenth Amendment. These cases relate to changes in the Common Law, in relation to trial by jury, challenges, verdicts of juries, and other State departures from the Common Law, and negative the proposition of the plaintiffs in error.

As we understand it, they contend that such departures are unconstitutional because under the Common Law previously adopted, these substantial rights of citizens were

fixed, and the State could not alter or vary them, without violating the amendment. This proposition leads to a manifest absurdity. If it be true, then all the barbarous crudities of the Common Law, which prevailed in Great Britain when the Common Law was adopted in the various States of the Union, must still be beyond the reach of abolition or remedy. If "the thing is true according to the law of the Medes and Persians, which altereth not"—Daniel, chap. vi, verse 12. For illustration: The pleas of wager of battle and benefit of clergy were only abolished in England long after the adoption of the Common Law in this country. Wager of battle remained a good plea in England until abolished by Act of Parliament, 59 Geo. III, c. 46, in the year 1819, and was last pleaded in the Englisn courts in 1817, an account of which is given by Charles Sumner in his oration on "The Grandeur of Nations." Benefit of clergy was only abolished in England in 1827 by Act of Parliament, 7 Geo. IV, c. 28, s. 6. It was only abolished in the United States courts by Act of Congress April 30, 1790, § 30, and then only in regard to crimes for which the punishment is death. The plea was sustained, however, in cases of bigamy as late as 1817. U. S. vs. Lambert, 2 Cranch C. C. 137; Fed. Cases No. 15,554, Vol. 26, p. 882; U. S. vs. Junegra, Fed. Cases No. 1547, 26 Vol. 606; 4 Cranch C. C. 118. In the State courts it was sustained in South Carolina as late as 1855, State vs. Bosse, 8 Richardson 276. In other States the plea has been sustained up to a comparatively recent date, 2 Iredell (N. C.) 257; 4 Call 109; 2 Asham (Penn.) 61; 7 S. & R. (Penn.) 423.

Wager of law by compurgators remained in force in England up to 3 and 4 Will. IV, c. 42, § 13. The last case in which it was successfully pleaded was in 1824 (Bouvier's Law Dict., *verbo* Wager of Law, 2 Vol. 647), although Mr. Justice Story, in 8 Wheat. 674, declared that it had been

abolished in Tennessee; if it ever existed in "the criminal law of our country by the emigration of our ancestors, it is perfectly clear that it cannot, since the establishment of the State of Tennessee, have had a legal existence," the Constitution of Tennessee and the Constitution of the United States guaranteeing a trial by jury.

There are other crude barbarities of the Common Law of England when it was adopted in this country. The argument of counsel for plaintiffs in error, if carried to its logical conclusion, would result in the absurd proposition that in those States in which there were no statutes abolishing those antiquated pleas, when the Fourteenth Amendment was adopted, the States could not thereafter abolish them without denying citizens of privileges and immunities, and due process of law. This seems to us a *reductio ad absurdum*, which would fasten the States for all time to the antiquated Common Law procedure, which would fetter the States, as the convict drags his ball and chain, in every step which these commonwealths might seek to adopt to improve their criminal procedure, in the onward march of civilization.

It seems to be now well established that a change in the rules of evidence in criminal cases, by State statutes, is not a violation of the Fourteenth Amendment.

"*Rules of evidence and Criminal Procedure.*—The State may change these consistently with the amendment, as elsewhere stated, (page 292)." Brannon on Fourteenth Amendment, p. 311, and on page 292 *ib.*, "*Changes in Rules of Evidence.*—It is clear law that a State may uncontrollably declare what shall be evidence in its courts."

So in Leeper vs. Texas, 139 U. S. 462, it was said: "By the Fourteenth Amendment the powers of the States in dealing with crimes within their borders are not limited, except that no State can deprive particular persons, or

classes of persons, of equal and impartial justice under the law; that the law in its regular course of administration through courts of law is due process, and when secured by the law of the State, the constitutional requirement is satisfied; and the due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Again in Hurtado vs. California, 110 U. S. 537, it was said: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." And the court renews the prior jurisprudence of this Honorable Court in 94 U. S. 113-134; 92 U. S. 90; 92 U. S. 480; 96 U. S. 97-105; 101 U. S. 22-31; 107 U. S. 288, 290; in which it was decided that—"Indeed, the great office of statutes is to remedy defects in the Common Law as they are developed and to adapt it to the changes of time and circumstances," and that such changes, if not discriminative of persons and classes of persons will not be construed as violative of the Fourteenth Amendment.

So, in 176 U. S. 605, it was said with approval: "As was stated by Mr. Justice Brewer, in delivering the opinion of the court in Brown vs. New Jersey, 175 U. S. 172, the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution."

In 177 U. S. 230, the syllabus reads: "The due process

of law of the Fourteenth Amendment does not control mere forms of procedure in State courts, or regulate practice therein; and all its requirements are complied with, provided that in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend." The syllabus is *verbatim* from the opening paragraph of the opinion.

Satisfied, as we are, that the verdict found by the jury in the trial court and the sentence of that court, as well as the judgment and decree of the Supreme Court of the State of Louisiana, sustaining that verdict and sentence, are correct, and not in violation of either the letter or the spirit of the Fourteenth Amendment to the Constitution of the United States, we respectfully ask that the judgment of the Supreme Court of Louisiana be affirmed with costs.

Respectfully submitted,

WALTER GUION,
Attorney General.

F. C. ZACHARIE,
Of Counsel.